APPEAL NO. 172969
FILED FEBRUARY 16, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 7, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that the respondent (claimant) reached maximum medical improvement (MMI) on March 22, 2017, with an impairment rating (IR) of 29%.

The appellant (carrier) appealed the ALJ's determinations as being contrary to the great weight of the evidence and further argued that the ALJ erred as a matter of law when she adopted a certification of MMI/IR that failed to consider and rate the compensable injury.

The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant testified that she sustained an injury on (date of injury), when she was robbed at gunpoint while performing her duties as a shift lead/manager for the employer. The parties stipulated, in part, that the carrier has accepted as compensable post-traumatic stress disorder (PTSD) and that the date of statutory MMI is March 22, 2017.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an

IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

In her decision, the ALJ determined that the claimant reached MMI on March 22, 2017, with a 29% IR as certified by the designated doctor, (Dr. C), in his Report of Medical Evaluation (DWC-69) dated May 4, 2017, and filed following his examination of the claimant on that date. We note that there are three DWC-69s dated May 4, 2017, in evidence from Dr. C but only one which certifies MMI on March 22, 2017, the date of statutory MMI as stipulated by the parties. We note further that in the certification adopted by the ALJ, Dr. C considered and rated not only the accepted condition of PTSD but also rated moderate to severe depression, a condition which has not been determined to be part of the compensable injury. This fact is made clear by Dr. C's response to a letter of clarification (LOC) dated July 17, 2017. Although the questions submitted with the LOC are not in evidence, in his response dated July 26, 2017, Dr. C stated:

> The [c]arrie[r] has accepted [PTSD], but not necessarily moderate to severe depression. A [DWC-69] [which] only rates [PTSD] is attached.

Dr. C submitted with his response to the LOC a DWC-69 which lists only the diagnosis code for PTSD and which assigns an IR of 29% but which also certifies MMI on March 25, 2017, a date subsequent to the date of statutory MMI stipulated to by the parties. For such reason, this certification cannot be adopted.

The remaining certification from Dr. C not only considers and rates moderate to severe depression but also certifies MMI on March 25, 2017, subsequent to statutory MMI. For such reason, this certification cannot be adopted.

Our standard of review is to determine whether the ALJ's decision is incorrect as a matter of law or not supported by sufficient evidence. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). *See also* Appeals Panel Decision (APD) 991972, decided October 13, 1999. In this case, the ALJ erred in adopting Dr. C's certification of MMI on March 22, 2017, and assignment of 29% IR because such certification and assignment rate not only the accepted condition of PTSD but also moderate to severe depression, a condition which has not, at this time, been determined to be part of the compensable injury.

There is one other certification in evidence that the claimant has reached MMI. The carrier's choice of physician, (Dr. D), conducted a post-designated doctor required medical examination of the claimant on July 25, 2017, and in a DWC-69 signed on

September 29, 2017, certified that, with regard to the accepted PTSD only, the claimant reached clinical MMI on February 17, 2017, with a 0% IR. In his accompanying narrative report, Dr. D indicated that his selection of the MMI date was based upon his understanding that medications, accompanied by psychotherapy and behavioral therapy, had been rendered by such date and that no additional therapy was rendered. We note, however, that medical records dated February 17, 2017, reference a plan of treatment which includes follow-up with the claimant's behavioral therapist subsequent to February 17, 2017. We note further that, in his report dated January 5, 2017, Dr. C indicated that the claimant had been approved for additional psychotherapy which, given his examination, was reasonable treatment, and that the claimant would not reach MMI for another 60 days, on or about March 5, 2017. Finally, the claimant testified that she continued receiving psychiatric treatment until the summer of 2017, shortly before Hurricane Harvey made landfall in (city). The evidence established that additional treatment for the compensable injury was recommended and received by the claimant subsequent to the MMI date certified by Dr. D and that it was anticipated that such treatment would result in further material recovery from or lasting improvement to her compensable injury. Dr. D's certification of MMI and assignment of IR is not supported by the evidence.

Because there is no MMI/IR certification in evidence that can be adopted, we reverse the ALJ's determination that the claimant reached MMI on March 22, 2017, with an IR of 29%, and we remand the issues of MMI/IR to the ALJ for further action consistent with this decision.

SUMMARY

We reverse the ALJ's determination that the claimant reached MMI on March 22, 2017, with an IR of 29%, and we remand the issues of MMI/IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The ALJ is to advise the designated doctor that the (date of injury), compensable injury extends to PTSD.

The ALJ is to further advise the designated doctor that the statutory date of MMI as stipulated to by the parties is March 22, 2017, and that the MMI date certified can be no later than the March 22, 2017, statutory date of MMI. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) and the provisions of Rule 130.1(c)(3). The parties are to be provided with the designated doctor's MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is to reconsider the evidence on MMI/IR, including the designated doctor's certification, and make a determination concerning MMI/IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge